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No. 83-915

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARY LAURA BROOKINS, ET AL., PETITIONERS

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioners' intervention in this school desegregation suit, which was sought on the day that the plan embodied in a consent decree was to be implemented, more than four months after the district court approved the decree.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 52-55) is reported at 710 F.2d 394. An earlier related opinion of the court of appeals not involving petitioners (Pet. App. 35-44) is reported at 692 F.2d 623. The opinion of the district court (Pet. App. 44-51) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. 55-56). The petition for a writ of certiorari was filed on December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 8, 1980, the United States filed suit pursuant to 42 U.S.C. 2000c-6 and 20 U.S.C. 1706 against the South Bend Community School Corporation, its Superintendent, and its Board of School Trustees, alleging that they

had unconstitutionally segregated students and faculty on the basis of race. On the same day, the parties submitted and the district court entered a consent order, which obligated the defendants to develop a desegregation plan, in consultation with the United States, and to implement the plan by the start of the 1981-1982 school year. Over the following year, the school board elicited widespread community participation in developing a plan. In December 1980, details of the plan were made available to the public through extensive media coverage. From December 1980 through February 1981, the school board held a dozen open meetings at which citizens were invited to air their views. Throughout that process, the school board made it known to the public that it was operating on a timetable that required implementation of a desegregation plan by the beginning of the 1981-1982 school year. Pet. App. 37-38.

On February 27, 1981, the parties submitted the plan as a proposed consent order to the district court (*ibid.*). Two groups sought intervention in the proceeding at that time. On the previous day, February 26, 1981, a group of parents (Clay) sought to intervene as defendants on the ground that the 1980 consent order was improperly entered because there was no finding or admission of a constitutional violation. Five days later, the South Bend Branch of the National Association for the Advancement of Colored People (NAACP) sought to intervene on behalf of a class of black students to raise questions about several particulars of the 1981 desegregation plan, including the impact of various school closings. Pet. App. 38-39. The district court held a hearing on both motions on March 5, 1981. On April 3, 1981, the parties submitted a revised proposed consent order to answer some of the concerns of the NAACP. Pet. App. 39.

On April 17, 1981, the district court denied both motions to intervene, finding that the NAACP and Clay were adequately represented by the United States and the school board, respectively. 511 F. Supp. 1352 (1981). The district court further concluded that the proposed consent order was lawful and constitutional and ordered its implementation. The court of appeals affirmed (Pet. App. 35-44; 692 F.2d 623 (1982)).

2. On September 8, 1981, the first day of the 1981-1982 school year, more than four months after the district court had approved the consent decree, petitioners filed a class action on behalf of students who had previously attended schools that petitioners alleged were "naturally integrated" and were either closed or converted to middle schools or alternative schools pursuant to the desegregation plan. The amended complaint alleged that the consent order violated both the Constitution and Indiana law. On October 13, 1981, the district court granted the school board's motion to consolidate this action with that of the United States and styled the complaint as a motion for intervention. Pet. App. 45-46. The motion, along with a subsequently filed motion for relief from the April 17, 1981, consent order, was considered at a hearing held on October 28, 1981. The district court then stayed consideration of petitioners' action pending a decision by the Seventh Circuit on the Clay and NAACP appeals.

On September 22, 1982, the district court issued an order denying the motion to intervene and dismissing the complaint (Pet. App. 44-51). The court held that the United States had adequately represented petitioners' interests and stated that the defendants also had "fully and fairly considered those interests" in developing the desegregation plan and therefore petitioners were not entitled to intervention as of right (*id.* at 49). The court also denied permissive intervention because of the prejudice that would result from granting it at such a late date (*id.* at 50).

3. The court of appeals affirmed (Pet. App. 52-55). It upheld the district court's conclusion that the United States had adequately represented petitioners' interests. Further, as an independent ground for denying intervention, the court of appeals concluded that petitioners had failed to satisfy the timeliness requirement of Rule 24, Fed. R. Civ. P., because they had waited for more than four months —until the day school opened —before challenging the consent decree (Pet. App. 54-55).

ARGUMENT

Petitioners' contention (Pet. 14-32) that the court of appeals erred in denying them intervention is without merit.[1] The court properly applied Fed. R. Civ. P. 24 in determining that petitioners failed to act in a timely fashion and that their interest was adequately represented by the United States.[2] The decision does not conflict with any decisions of this Court or other courts of appeals and raises no legal issue of general importance that merits review by this Court.

1. The court of appeals correctly concluded (Pet. App. 54-55) that petitioners' attempt to challenge the consent decree was untimely. Petitioners waited more than four months after approval of the decree before challenging it.

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[1]Petitioners appear to argue in this Court (Pet. 19-22) that it was error for the district court to treat their lawsuit as a motion to intervene. This contention was raised for the first time on rehearing, and therefore it was never addressed by the court of appeals. Accordingly, there is no reason for this Court to consider it now (see, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977)), particularly since petitioners advance no cogent reason why the district court erred in this respect.

[2]The failure to meet one of the four requirements of Rule 24(a)(2) is sufficient reason to defeat intervention as of right under that Rule. See *NAACP* v. *New York*, 413 U.S. 345, 369 (1973). Here, petitioners fail to meet two requirements —timeliness and showing inadequate representation.

The court of appeals correctly found (*id.* at 55) that petitioners "should have filed within days of the April 17 order, if not sooner; there was no excuse for waiting till the school year began, so that if the motion had been granted the implementation of the decree would have been delayed." The court's conclusion simply followed this Court's repeated injunction that an applicant for intervention must act promptly in alleging that its interests have not been represented adequately. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977); *NAACP* v. *New York*, 413 U.S. 345 (1973).

The details of the consent decree were extensively publicized as early as December 1980. Petitioners must be charged with knowledge of any alleged inadequacy of representation at least when the final consent decree embodying the desegregation plan was made public in April 1981. They offer no excuse for delay. Permitting intervention on the first day of school would have unfairly prejudiced the parties to the decree and the students of South Bend. See *NAACP* v. *New York*, 413 U.S. at 369.

2. The court of appeals also correctly affirmed the district court's holding that the United States adequately represented petitioners' interests. It should be presumed that the United States adequately represented petitioners' interests in the litigation since they both had the same objective —desegregation of the South Bend schools.[3] This is particularly so when the government is charged by law with representing the interests involved. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976). Petitioners have made no showing of gross negligence, bad faith, or collusion that

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[3]Petitioners' differences with the United States lie in the choice of means to accomplish that end, rather than in a divergence of interests.

would rebut this presumption. See Pet. App. 53-54; *id.* at 49; *United States* v. *Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), cert. denied, 410 U.S. 909 (1973). Compare *Trbovich* v. *UMW*, 404 U.S. 528, 538 (1972) (Secretary of Labor held to be inadequate representative where statute imposes upon him "the duty to serve two distinct interests * * *").

Apparently, petitioners' allegation of collusion rests solely on the fact that the parties entered into a consent decree (see Pet. 20-21). A consent decree, however, is recognized as the preferred method of resolving school desegregation litigation "because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 318 (7th Cir. 1980); see also *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The decision of the parties to compromise their dispute surely cannot sustain an allegation of collusion.

Nor have petitioners alleged facts that demonstrate that the United States failed competently to represent their interest in a lawfully desegregated school system. Petitioners complained that the closing of certain public schools and the conversion of others to middle or alternative schools under the consent decree was unconstitutional, unwise, and irrational (Pet. App. 49). These contentions amount to the type of disagreement with discretionary choices regarding the best means of desegregating a dual school system that have consistently been found insufficient to support intervention as of right. See *Pate* v. *Dade County School Board*, 588 F.2d 501 (5th Cir.), cert. denied, 444 U.S. 835 (1979); *United States* v. *Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978); *Hines* v. *Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973). Petitioners' allegations simply fail to overcome the presumption of adequate representation that attaches when the

United States and a would-be intervenor have the same ultimate objective. See, *e.g.*, *United States Postal Service* v. *Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Indeed, the very desegregation plan that petitioners allege is unconstitutional was previously found to be "well within the Constitution of the United States and * * * the state statutory authority of the defendant school board." *United States* v. *South Bend Community School Corp.*, 511 F. Supp. 1352, 1361 (N.D. Ind. 1981).

Finally, petitioners had an unusually extensive opportunity to present their views regarding the desegregation plan to both the United States and the school board. As the district court found (Pet. App. 46):

> The school board enlisted community support for the development of the new student assignment plan. A Citizen's Advisory Committee was formed and over 300 citizens volunteered to serve on subcommittees. Subcommittees met over 150 times between February and December 1980 and nearly 200 people actively participated in the meetings. All meetings were open to the public and were given extensive newspaper publicity.

In addition, from December 1980 through February 1981, the school board held 12 public meetings regarding the proposed plan, at which members of the public were invited to speak. Petitioners therefore have had considerable opportunity to air their views and to have them considered by the parties in formulating the consent decree. Petitioners' disagreement with the final balance struck between competing interests in formulating the consent decree does not entitle them to intervention as of right. See, *e.g.*, *Pate* v. *Dade County School Board, supra.*[4]

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[4]Petitioners' contention (Pet. 16) that the court of appeals should have remanded the case to the district court to hold an evidentiary hearing on the intervention is also without merit. Because petitioners'

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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complaint failed to allege facts that, if true, would have required the district court to grant the intervention, the complaint correctly was dismissed without an evidentiary hearing. Because petitioners' allegations amount only to disagreement with particulars of the consent order regarding the closing of certain schools and changes in the functions of others, it is clear from the face of the complaint that they seek to challenge decisions regarding how best to desegregate the South Bend school system, rather than constitutional deficiencies in the plan. Dismissal without an evidentiary hearing of a facially inadequate attempt to intervene plainly does not deprive the applicant for intervention of due process. See *Codd* v. *Velger*, 429 U.S. 624 (1977). Moreover, a court may dismiss without hearing a petition to intervene that is untimely on its face, as this one was. See *NAACP* v. *New York, supra*; *United States* v. *Louisiana*, 669 F.2d 314 (5th Cir. 1982).

For these reasons, petitioners' allegation of a conflict in the circuits based on *Adams* v. *Baldwin County*, 628 F.2d 895 (5th Cir. 1980), is erroneous. Although *Adams* states that the preferred procedure is to hold a hearing on a motion to intervene, the subsequent decision in *United States* v. *Louisiana, supra*, establishes that it is not the rule in the Fifth Circuit that a hearing is required when a motion to intervene is facially insufficient.

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